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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1983

AMERICAN DISTRIBUTING COMPANY, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

(1) Whether an employer, consistent with Section 302 of the National Labor Relations Act, as amended, must make contributions to a trust fund on behalf of its employees in the absence of either a collective bargaining or a trust fund agreement which satisfies the requirements of that section designed to ensure that its employees can enforce their rights in those contributions paid to the fund in lieu of wages to those employees?

(2) Whether the National Labor Relations Board, consistent with congressional intent to deter strikes and the realities of the collective bargaining process, may substitute its judgment for that of the parties in the guise of requiring of them, while acting under pressure, both formal notice of their respective bargaining positions and carefully drafted contracts?

## PARTIES TO PROCEEDING

The following parties are directly or indirectly involved in this proceeding:

(1) American Distributing Company, Inc.;

(2) National Labor Relations Board;

(3) General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and

(4) Western Conference of Teamsters Pension Trust.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. A-1), as amended (Appendix B, at p. A-13), is not yet reported. The Decision and Order of the National Relations Labor Board (Appendix C, at p. A-15), is reported at 264 N.L.R.B. 183. The decision of the administrative law judge (Appendix D, at p. A-17), is not reported.

## JURISDICTION

The order of the Ninth Circuit enforcing the Board's order, was entered on September 6, 1983. (Appendix E, at p. App. A-31.) Petitioner's timely petition for rehearing was denied by the Ninth Circuit's order entered on November 15, 1983. (Appendix F, at p. App. A-32.) This petition is filed within 90 days of that date. Jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves construction of Subsections 8(a) and (d) and Section 302 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a), (d) and 186, respectively. Due to their length, these provisions are set forth in Appendix G. (App. at p. 33.)

## STATEMENT OF THE CASE

Jurisdiction of the Board is based on the provisions of subsections (a), (b) and (c), and that of the Ninth Circuit on the provisions of subsections (e) and (f), of Section 10 of the National Labor Relations Act, as amended, (29 U.S.C. § 160).

Petitioner, American Distributing Company (hereafter Company), a wholesale lumber distributor in Modesto,

California, has been party to a series of collective bargaining agreements with Teamsters, Chauffeurs, Warehousemen and Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter Union) since about 1954. For many years these contracts required Company to make monthly contributions to the Western Conference of Teamsters Pension Trust Fund (hereafter Fund).

For many years Company was unhappy with the Fund, and told Union it believed the Fund was in financial difficulty and Company could provide both more secure and greater pension benefits to its employees by enrolling them in its own retirement program. Union, however, in successive collective bargaining negotiations, successfully insisted upon Company's continued participation in the Fund.

The most recent collective bargaining agreement between Company and Union, effective from May 1, 1977 through April 30, 1980, was negotiated in early 1977. During these negotiations, Company reiterated its substantial concern about the Fund's financial health, and Company's strong opposition to continued participation in the Fund persisted until the very last negotiation session, at which Union threatened to strike unless Company agreed to stay in the Fund, and increase its contributions for an unchanged level of pension benefits.

The Company yielded to the strike threat and agreed to its continued participation in the Fund. However, Company stated emphatically it agreed only because of the threatened strike and would do so only for the term of the new contract, 1977 to 1980, "and at the end of that con-

tract, that was it." On expiration of that contract, it would stop making Fund contributions. (Tr. 107-08, 160-61, 163, 200, 216.)

Union agreed Company was obligated to continue Fund contributions only for the new contract's life. Pursuant to this agreement, and at Company's insistence, Union and Company *physically crossed out* from Union's contract proposal this language, which Company asserted created the impression it agreed to continue Fund contributions beyond the contract's expiration:

> The parties agree that because the Trustees of the Fund will rely on the execution of this Agreement to restore or not to reduce benefits to retiring employees as indicated above, this Agreement may not be modified, terminated, or rescinded by the parties, directly or indirectly, without the express written consent of the Trustees.

(See Appendix H, App. at p. 44.)

Similarly, Company agreed to sign a Fund "Employer-Union Pension Certification" (hereafter, Certification[1] only because, on its face, it expired the same day as the collective bargaining contract—April 30, 1980. Finally, and because Company objected so strenuously to continued Fund participation, it successfully insisted on signing the Certification "under protest." (See Appendix I, App. at p. 45.)

On February 21, 1980, Company sent Union a letter stating its desire to terminate the existing contract on its

[1]A Certification is the Fund document binding an employer to the Western Conference of Teamsters Declaration of Trust and Plan and requiring it "to pay to . . . Trust the pension contributions specified in the pension agreement with the Union." The Certification defines "pension agreement" as a Teamsters Union collective bargaining agreement.

expiration date, and begin a new round of contract negotiations, rather than allow the contract to extend itself for one year. Also during February, Union negotiator John Souza met with Company negotiator August Sommerfeld, at Souza's request, to evaluate the likely course and tenor of upcoming contract renewal negotiations. During this meeting, Sommerfeld told Souza that on May 1, 1980, on expiration of the current contract, Company would stop making Fund contributions. Souza responded: "It was up to them"; "it was up to the Company."

On April 9, Souza asked for a meeting with Robert E. Lee, who replaced Sommerfeld as Company's contract negotiator. They met on April 10, and Lee told Souza Company was "going to discontinue the pension contributions at the expiration of the contract."

The current contract expired April 30, 1980. On May 1, 1980 Union and Company held their first formal contract renewal bargaining session. At the outset, Souza asked Lee if Company was serious about discontinuing Fund contributions as established by the just expired contract. Lee responded: "Yes we were. As far as we were concerned it was like throwing it out the window." Souza did not respond. Later in the same meeting, Souza gave Company a written contract proposal containing eight desired contract changes, one of which asked Company to sign a *new* Teamsters Pension Fund Certification and agree to pay 14 cents per hour more in Fund contributions during a *new*, 1980-1983 contract than had been paid under the expired contract.[2]

[2]During subsequent negotiations, Souza lowered the proposed increase of a new Fund contribution to seven cents per hour but at the last bargaining session material to this case he returned to a 14-cent-increase position.

In May, 1980, Company made its last pension contribution to the Fund for its employees, based on the rates set by the expired contract, for hours worked by its employees during April, 1980, the last month of that contract's life. Thereafter, during all times material to this case, Company made no further Fund contributions. On July 18, 21, and 28, 1980, Northwest Administrators, the Fund's administrator, and its agent, sent Company a delinquency notice, a mailgram, and a form letter, respectively, confirming the Fund had not received monthly pension contributions from the Company for May and June 1980.[3] *Northwest Administrators sent a copy of the July 28 letter to the Union.* (See App. at pp. 21, 26.)

Despite its knowledge that Company intended to exercise its contractual right to cease contributions to the Fund on the expiration of the 1977-1980 contract on May 1, 1980, and despite its notice in July, 1980, that Company had, in fact, ceased making such contributions, Union never mentioned Company's discontinuance of Fund contributions during all the negotiation sessions material to this case. It never objected to it. It never asked Company to continue making Fund contributions pursuant to the terms of the expired contract. Moreover, during the 1980 negotiations, Company offered to contribute more money to a company sponsored profit-sharing retirement program than it would have had to pay for continued Fund participation. It again argued the Fund's financial condition is precarious and,

[3]On September 23, 1980, Company wrote the Fund stating it had not made contributions to the Fund since May 1, 1980, because no signed collective-bargaining contract with the Union existed and Company did not intend to make contributions so long as no such contract existed.

therefore, employees would receive both a more secure and a greater retirement benefit from Company's program. Company again stressed its employees already were fully vested under Union's Plan and, assuming that its Plan could meet its retirement promises, Company's employees would enjoy benefits from two different retirement programs. Union persisted, however, in urging the Company's future Fund participation—but this time without a strike threat, and Company did not agree. (Tr. 119-20, 209-11.)

Then, on December 8, 1980, for the first time, Union protested Company's cessation of Fund contributions, and on December 29, 1980, it filed charges with the Board against Company which led to the instant case.

## REASONS FOR GRANTING THE WRIT

### I

### THE DECISION BELOW IGNORES THE REQUIREMENTS OF SECTION 302, ENACTED TO PROTECT EMPLOYEES, AND THIS COURT SHOULD VINDICATE CONGRESS' INTENT AND COMPANY'S RELIANCE ON THAT INTENT, AND RESOLVE THE CONFLICTING APPROACHES BY DIFFERENT CIRCUITS IN CONSTRUING THOSE REQUIREMENTS

#### A. Congress Enacted Section 302 Expressly to Protect the Interests of Employees, Rather than Unions Or Employers

Section 302(a) of the Act, 29 U.S.C. § 186(a) provides in pertinent part that it "shall be unlawful for any employer . . . to pay . . . any money . . . to any representative of any of his employees who are employed in an

industry affecting commerce." Section 302(b)(1), 29 U.S.C. § 186(b)(1), provides "it shall be unlawful for any person to . . . receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."

Section 302(c)(5), 29 U.S.C. § 186(c)(5), provides in pertinent part that Sections 302(a) and (b) "shall not be applicable . . . with respect to money . . . paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . Provided, . . . . That (A) such payments are held in trust . . . for the benefit of employees . . . for medical or hospital care, pensions or retirement or death of employees . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . ; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities. . . ."

Finally, Section 302(d), 29 U.S.C. § 186(d), provides: "Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

In enacting Section 302, Congress was very concerned with possible trust fund abuses. It passed the section in response to demands of the United Mine Workers Union on coal mine operators to pay a royalty of 10 cents a ton on all coal mined to a welfare fund controlled by the

union. Congress was concerned the mine workers' fund, and other funds like it, could become tremendous financial resources which unions "may use indiscriminately." (93 Cong. Rec. at p. 4876 (1947) [remarks of Senator Taft]; 1 NLRB, Legislative History of the Labor-Management Relations Act, p. 1310 (1947) [hereafter Leg. Hist. LMRA].) Congress concluded that without the restrictions contained in Section 302, "welfare fund[s] will become a racket." (93 Cong. Rec. at p. 4877 (1947) [remarks of Senator Taft]; Leg. Hist. LMRA, at p. 1313.)

Congress concluded the way to prevent the possible abuse of trust funds was to mandate that each "welfare fund" shall be a "perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund . . . ." (93 Cong. Rec. at p. 4876 (1947) [remarks of Senator Taft]; Leg. Hist. LMRA, at p. 1311.) "[T]he sole purpose of . . . [Section 302] is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes . . . . [T]here is a very grave danger that the funds will be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they are established, and that they will in fact become rackets." (93 Cong. Rec. at p. 4805 (1947) [remarks of Senator Ball]; Leg. Hist. LMRA at p. 1305.) The establishment and existence of welfare funds is a "growing practice which is certainly liable to serious abuse [and] we ought to make some provision in this bill to take care of the matter."

(93 Cong. Rec. at 4878 (1947) [remarks of Senator Taft]; Leg. Hist. LMRA at p. 1314.)

Section 302 therefore "requires that there be specified in the agreement the exact terms under which benefits are to be received. The complete terms with respect to benefits must be set out in the agreement. If it is only a trust fund for welfare purposes, with no specific terms or regulations, a court of chancery cannot write a welfare fund system into it. The court has no power to do that. No single employee can bring suit under such a general fund provision and prove that he personally has any rights whatever in the fund." (93 Cong. Rec. at p. 4883 (1947) [remarks of Senator Taft]; Leg. Hist. LMRA at p. 1322.)

Section 302 is, in short, an employee-protective law. The right to sue trust funds to recover the benefits promised, not only protects employees' rights to the money that would otherwise go into wages, but also prevents those administering such funds from misusing employers' contributions.

**B. Despite Congress' Clearly Expressed Intent, Different Circuits, and Even Different Panels Within Circuits Have Construed Section 302's Protective Terms from Totally Different Premises, Which Has Produced Uncertainty In the Section's Application and Risks Aborting the Underlying Congressional Policies It Espouses**

Because of its basic purposes, the Fifth Circuit concluded Section 302 should be interpreted to achieve "strict compliance" with its "purposefully rigid" requirements. (*Bricklayers, Masons & Plasterers, Local Union No. 15 v. Stuart*

*Plastering Co.*, 512 F.2d 1017, 1024, 1026 (5th Cir. 1975).) While this approach has been employed by some courts to deny deserving individual employees rights to benefits, a leading Section 302 case, repeatedly relied on by the Board and several circuits in upholding plans despite a literal noncompliance with the law is *Harold W. Hinson, d/b/a Hen House Market No. 3*, 428 F.2 113 (8th Cir. 1970), in which the Eighth Circuit concluded the contractual requirement of Section 302 was satisfied, notwithstanding a collective bargaining agreement's expiration, because a "trust fund agreement separate and apart from the collective bargaining agreement would surely satisfy the statutory prerequisite." (428 F.2d at 139.) The Board, too, in *Henry Cauthorne, an individual t/a Cauthorne Trucking*, 256 N.L.R.B. 721, 722 note 6, (1981) emphasized that a Section 302 challenge was overcome by the existence of a signed trust document with an indefinite expiration date which, therefore, survived the expiration of the collective bargaining agreement.[4]

This line of holdings, however, does not support relaxation of Section 302's "purposefully rigid" requirements, when there is neither a collective bargaining agreement nor a trust agreement in effect (see *Moglia v. Geoghegan*, 403 F.2d 110, 116-17 (2d Cir. 1968), *cert. den.*, 394 U.S. 919 (1969), or when an existing agreement does not authorize the particular type of payment sought to be made (see *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976) [no provision for retroactive payments to "cure" an employee's breaks in service]), however deserving the employee's claim may be.

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[4]*Cauthorne* was enforced by the District of Columbia Circuit. (*NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982.)

Thus in *Moglia*, a widow was denied benefits despite the contribution of her deceased husband's employer to a *legitimate* Teamster pension fund for 28 years. The fund was jointly administered and met *all* Section 302 requirements. The employer made contributions in amounts specified by successive collective bargaining agreements. The trust fund audited its contribution compliance. In short, the employer, by conduct, adopted successive collective bargaining agreements. However, it never signed one. And, because a signed collective bargaining agreement and a signed trust certification did not exist, the employee's widow was denied retirement benefits. (403 F.2d at 116.) This Court denied certiorari.

Here, too, as in *Moglia*, there was neither a collective bargaining agreement, nor a trust agreement in existence following their *simultaneous expiration* on April 30, 1980. As the Fund clearly recognized, it could not accept payments from Company, had it made them.[5]

[5]The Fund repeatedly expressed its understanding that it could not accept benefits absent a new collective bargaining agreement and a new Certification. On August 7, it wrote Union and Company that "to continue to accept pension contributions, we must be furnished with an Employer-Union Pension Certification form pertaining to the renewed Labor Agreement." On September 9, it wrote Union it could not "retain pension contributions unless there is a written Labor Agreement and an Employer-Union Pension Certification in effect requiring such contributions." On October 21, the Fund again wrote Union and Employer it was "unable to retain pension contributions without the existence of a current written Labor Agreement." And finally, on November 21, it wrote both advising that "if a written agreement is not furnished to us within thirty (30) days from the date of this letter, no further contributions will be accepted, all contributions received by the Trust during the period when no written Labor Agreement was in effect shall be deposited in a separate account, and any annuities inadvertently purchased during that period will be cancelled or adjusted. Additionally, the Employer Pension Account will be dropped."

The court below, nevertheless, held that Section 302's requirements were satisfied by the expired collective bargaining agreement, relying on its earlier decisions in *Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981), and *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981). (See App. at p. 9.) Since the opinions in both *Peerless Roofing* and *Producers Dairy* rely on *Hinson*, however, it is clear that they did not present a case where neither a collective bargaining agreement nor a trust agreement was in effect. (See 641 F.2d at 736; 654 F.2d at 627.) Indeed, *Moglia* is distinguished in *Peerless Roofing*, on this ground. (See 641 F.2d at 736, note 2.) Both cases are, in any event, readily distinguishable in critical respects.[8]

More significant, by its uncritical reliance on its earlier decisions, the court below failed to consider the serious potential for abuse Congress recognized when there is no

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[8]In neither case was the continuation of payments contested by the employer. In *Peerless Roofing* the employer merely unilaterally ceased payments pending negotiation of a new collective bargaining agreement concerning other issues. (641 F.2d at 735.) In *Producers Dairy*, the employer continued to make payments and sought a *refund* after an impasse was reached. (654 F.2d at 627.) Here, in contrast, there was a long history of Company's objection to the continuance of payments, and it reasonably believed that it had contracted for the right to cease making payments for work performed beyond April 30, 1980. Thus, reliance by the court below on Company's duty to maintain the status quo pending negotiations for a new collective bargaining agreement is, in reality, a bootstrap argument. Absent its simultaneous rejection of Company's reliance on Union's contractual waiver of continuing payments, which is addressed below (see Point II, B, *infra*), the court would clearly have no basis for relying on the rationale of *Peerless Roofing* and *Producers Dairy*, which impose a duty of continued compliance with the terms of an expired collective bargaining agreement.

contractual provisions to control the *disposition* of the funds paid to a trust fund. The opinion below only addresses the question of the *payment* of funds, which presents no serious problem if there is an existing trust agreement defining the employees' rights to the funds. But had Company continued contributions here according to the expired collective bargaining agreement *without* any trust agreement governing the disposition of those contributions, Company's employees would have had no defined and enforceable rights to those funds. This fact, indeed, was recognized by the Fund when it advised that, had Company made any contributions, they would have had to be placed in a separate account, *and* "any annuities inadvertently purchased" would have had to be "cancelled or adjusted." (See note 5, *supra.*)

Thus, the precise *potential* for evil which Congress sought to avoid by enactment of Section 302 would have been established. (See, e.g., *Arroyo v. United States,* 359 U.S. 419, 425-26 (1959); *Snider v. All State Administrators, Inc.,* 481 F.2d 387, 390 (5th Cir. 1973).) Company, accordingly, was privileged, indeed required to cease payments to avoid the potential of criminal liability. (See *Arroyo v. United States, supra,* 359 U.S. at 423-24; *United States v. Keegan,* 331 F.2d 257, 261-62 (7th Cir. 1964), *cert. den.,* 379 U.S. 828 (1964); *Robert L. Boyle, et al., t/a John F. Boyle Co.,* 222 N.L.R.B. 1309 (1976).) The real effect of the rulings of the Board and the court below, therefore, is to compel employers in Company's position to chose between the risks of criminal responsibility and an unfair labor practice charge.

In any event, the opinion below is clearly at odds with that of the Second Circuit in *Moglia,* if not in direct con-

flict with it, and defeats the policy premises of Section 302. This Court should, therefore, resolve this confusion and possible conflict, by vindicating the policy premises underlying enactment of Section 302.

## II

## THE OPINION BELOW IMPOSES ON THE PARTIES TO COLLECTIVE BARGAINING CONTRACTS UNREALISTIC REQUIREMENTS OF FORMALITY TO DENY COMPANY THE BENEFITS OF SECTION 8(d) OF THE ACT AND TO DEFEAT COMPANY'S JUSTIFIABLE RELIANCE ON UNION'S ACCEPTANCE OF ITS CESSATION OF FUND CONTRIBUTIONS, AND THIS COURT SHOULD, THEREFORE, REESTABLISH THE PARTIES' RIGHT TO NEGOTIATE FREE FROM HINDSIGHT JUDGMENTS OF THE BOARD

### A. The Opinion Below Ignores the Realities of the Collective Bargaining Process by Imposing Inappropriate Formality on the Parties which Will Deter Contractual Resolution of Disputes and Enhance the Likelihood of Strikes

As noted above, the rationale of the court's construction of Section 302 below is inapplicable if there is a right to cease making fund contributions under the expired contract. (See note 6, *supra*). The opinion never confronts this issue, however. For, in contrast to its loose construction of Section 302, it adopted a strict construction of the contract wholly divorced from the realities of the collective bargaining process.

When negotiating a collective bargaining agreement, there is extreme pressure on both employers and unions to reach an agreement because of the losses to both sides during strikes. There is, therefore, "a degree of mutual interdependence which we seldom associate with simple contracts. Sooner or later an employer and his employees must strike some kind of a bargain. The costs of disagreement are heavy." (Cox, *Reflections Upon Labor Arbitration*, 72 Harv. Law Rev. 1482, 1490-91 (1959).) "Collective agreements . . . are [consequently] less complete and more loosely drawn than many other contracts; therefore, there is much more to be supplied from the context in which they were negotiated." (*Id.* at 1500.)

The opinion below wholly ignores these paramount facts applicable to the collective bargaining process generally, and which are graphically exemplified by this case. Here, Union's strike threat, and the parties' desire to avoid a strike, were at the heart of their negotiated pension plan agreement. Union put a strike gun to Company's head to get its pension plan; Company acquiesced, but obtained Union's agreement that its obligation to participate in the Fund would end on the contract's expiration. Accordingly, Company was privileged to cease Fund contributions pursuant to its negotiated agreement. (Compare *NLRB v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954); accord, *Intermountain Equipment Company v. NLRB*, 239 F.2d 480 (9th Cir. 1956).) As stated in *NLRB v. Nash-Finch Co., supra*, an employer "may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them calls for." (211 F.2d at 627.)

**B. The Opinion Below Denies Company the Protection of Section 8(d) of the Act by Upholding the Board's Substitution of Its Judgment for that of Company and Union Concerning Continuation of Fund Contributions**

**1. Section 8(d) is designed to bar the precise result enforced by the court below**

Section 8(d) of the Act, 29 U.S.C. § 158(d), provides that neither employers nor unions are compelled to agree to any proposals or make any bargaining concessions. Neither the Board nor the courts may regulate the substantive terms of collective bargaining agreements. They do not write labor contracts nor pass on the wisdom of concessions made by the parties. The contents of collective bargaining agreements is determined solely by the parties across the bargaining table. (*NLRB v. American National Insurance Co.*, 343 U.S. 395, 402, 404-05 (1952).)

"Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargaining process under the guise of enforcing the duty to bargain in good faith." (*Chicago & N. W. R. Co. v. Transportation Union*, 402 U.S. 570, 583, note 19 (1970).)

As noted by Justice Rehnquist, concurring and dissenting in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1971), "[a]n employer may adamantly refuse, at the expiration of the period covered by a collective-bargaining agreement, to again consent to a particular term of the agreement that the employees regarded as significant." (406 U.S. at 304.)

**2. Reasonably construed, in light of the long-standing and immediate dispute between Company and Union concerning Company's continued contributions to the Fund, the 1977 contract privileged Company to cease such contributions on the expiration of that contract**

In *Henry Cauthorne, an individual t/a Cauthorne Trucking, supra,* 256 N.L.R.B. at 722, *enforced,* 691 F.2d 1023, (D.C. Cir. 1982), it was held an employer was privileged to cease making pension fund contributions after expiration of a collective bargaining agreement because the pension fund trust agreement contained this language:[7]

> "IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued."

This language, itself, demonstrates the hurriedness of collective bargaining drafting. The language here may be less clear, but it was negotiated under extreme pressure, at the eleventh hour, to avoid a strike, and it was found that the parties omitted the relevant language in the contract specifically in response to Company's successful

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[7]There were two separate trust funds in *Cauthorne,* one for health and welfare, and the other for pensions. The Board held, and the circuit enforced its decision, that the employer was not privileged to unilaterally cease payments to the health and welfare fund. There was, however, no similar language which privileged such conduct with respect to that fund, and since that fund agreement was of indefinite duration, it survived the expiration of the collective bargaining agreement.

assertion it would not make pension contributions beyond the contract's expiration. This intent may not have been stated as clearly as it would have been in a commercial contract negotiated by attorneys, but, since it was a collective bargaining agreement, the standards for determining the parties' intent are different.[9]

The notice of intent to change a labor contract need not rise to the same formality and specificity of a notice of intent to change a commercial contract. "Common law conceptions of notice, including formality and specificity, are no more helpful in this area [of collective bargaining agreements] than are traditional contract notions." (*NLRB v. Cone Mills Corp.*, 373 F.2d 595, 599 (4th Cir. 1967).) "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. . . . '. . . It calls into being a new common law—the common law of a particular industry or of a particular plant.' . . . In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. . . ." (*Trans-*

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[9]"Members of the labor-management community generally agree that labor contracts by nature simply are not clear and unambiguous. Because of the special role of the agents who draw up the actual terms of an agreement—each man representing innumerable individuals and diverse interests—as well as the complex relationships between the parties to the contract, it is unrealistic to look for concise terms with explicit listings of powers and duties and express waivers of specific rights. . . ." (Note, *Contract Interpretation in Unfair-Labor-Practice Disputes*, 21 Stan. L. Rev. 1249, 1262 (1969).)

*portation-Communication Employees Union v. Union Pacific Railroad Company*, 385 U.S. 157, 160-161 (1966).[9]

Here, Company did everything reasonably expected of nonattorneys negotiating a contract. It insisted on the excision of language from the contract which might suggest a continuing duty beyond the contract being signed. (See App. H.)[10] It insisted that the Fund agreement's termination coincide with the expiration of the collective bargaining contract. (See App. I.) And it reaffirmed, months before expiration of those agreements, that it intended to exercise its bargained right in that contract. The Board's insistence on something more formal is, therefore, unreasonable, and totally at odds with the realities of collective bargaining agreements. The court below, moreover, in upholding the Board in this regard, has confused the Un-

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[9]In this connection it should be noted that the provision, deletion of which Company negotiated in 1977 (see App. at p. 44), was standard language proposed by Union.

[10]The opinion below does not resolve "the unique question whether a contractual waiver of a mandatory bargaining subject may ever survive the termination of the contract" (see App. at p. 6), but this issue should also be put to rest. In 1977, Company and Union avoided a strike by compromising the pension plan issue. By suggesting employers cannot limit their agreements to a date certain, the court below tells employers they must wage total war immediately regarding all matters they wish to change, either currently or prospectively. Clearly, a rule which dictates such conduct is bad labor relations policy. (See and compare, in any event, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 555 (1964) ["We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement has expired."].)

ion's statutory right to bargain about pension rights with its members' contractual right to receive them.[11]

Accordingly, this Court should vindicate and reestablish the right of both employers and unions to contract freely about which rights they are to enjoy so long as they bargain in good faith.[12]

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[11]Employees have no statutory right to receive pension benefits. Rather, unions have a statutory right to bargain for them. If a union succeeds, the enabling language is set forth in a collective bargaining agreement. Thus, the basis for any pension benefit rights is contractual, not statutory. And, while a Union's waiver of its *bargaining* right must be clear and unmistakable, its contractual relinquishment of continued pension fund participation, pursuant to and after bargaining, need not be stated clearly and unmistakably. The parties must be free to end pension benefits with normal contractual language. What the parties can create, they must be free to change. Thus, the reliance placed on *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967) below is misplaced. That case addresses the waiver of bargaining rights, not contractual rights. The specific contractual clause involved was entitled "Waiver of Duty to Bargain." (385 U.S. at 423, note 4.) This Court held it did not waive the union's statutory right to bargain with the employer over wage rate changes. (385 U.S. at 430-31.)

[12]In this case, the parties did not even attempt to waive Union's right to bargain for Company's continued participation in the pension plan. Indeed, in 1980, Company without hestitation engaged in such negotiations with Union. Company simply negotiated into its 1977 contract the understanding that upon its expiration, it would cease fund contributions, and it would cease such contributions forever unless, during the 1980 renewal contract negotiations, Union convinced it to reenter the Fund.

### C. The Requirement of Formal Notice Before Reliance May Be Placed on Union's Acquiescence to Company's Cessation of Fund Contributions Is Unsound Policy, Given the Realities of Collective Bargaining Negotiations, and Conflicts with the Rationale, if not the Holding of the Fifth Circuit; Thus This Court Should Vindicate the Right of Unions and Employers to Negotiate without Resort to Formal Notices in the Midst of Negotiations

In its initial opinion, the court below did not uphold the Board's conclusion that Company's clear statements in 1980—that it was discontinuing contributions to the Fund —were mere "loose verbalisms." (See App. at p. 8.) After being convinced by Company's petition for rehearing that there was no evidentiary basis for its resolution of the issue of Union's waiver for inaction on other grounds, however, it fell back on that reasoning, concluding Company's statements of intent were not sufficient to constitute "express notice." (See App. at p. 13.)[12] But if Company's clearly stated intentions are deemed merely ineffective "loose verbalisms," then the contracting parties must communicate

[12]To reach this conclusion the court below was compelled to disregard the fact the Company's oral notices to Union in early 1980 were *confirmations* of its intent to exercise its contractual right to cease Fund contributions which it had negotiated in 1977. Instead, the court relies on the earlier "bargaining history" between Company and Union to uphold the Board's decision that Union could justifiably ignore Company's statements it was going to exercise its 1977 contract right .(See App. at pp. 13-14.) Since the 1977 contract gave Company a new, negotiated right to cease contributions after April 30, 1980, however, its previous continuation of contributions during contract renewal negotiations, in the absence of any such contract right, could not reasonably support a conclusion by Union that Company was not serious about its intent to rely on the 1977 contract.

with each other only in writing. A writing requirement, however, is totally at odds with the collective bargaining process, both during contract negotiations and during the administration of contracts.

This new rule of the Board, upheld by the court below, moreover, is clearly bad labor relations policy. Under this rule, neither employers nor unions must react to communications from the other if, in their own *subjective* judgment, they regard them as "irrelevant" or mere "grumblings." Under the Board's new doctrine, a party cannot orally communicate intentions to another party because the other party is free to make its own subjective evaluation about whether the speaker is "serious" or just verbalizing "opposition rhetoric." (See App. at pp. 24-28.)

Only formal written notice will suffice. Even oral notice as clear as stating that making continuing fund contributions is "like throwing money out the window" is not sufficient. (See App. at pp. 7-8, note 2.)

Until this case, when a union was put on notice about an employer's projected course of action, and the union felt it should be consulted before such action took place, it was obligated to say so. It had to protest or ask to bargain regarding the employer's stated course of action. It was not free to stand idly by on the assumption, or hope, that the employer was not "serious."

In *Houston Shopping News Co. v. NLRB*, 554 F.2d 739 (5th Cir. 1977), an employer informed its employees, not their union, that it intended to lease out the department in which they worked. The employees so informed their union while it was engaged in contract renewal negotiations

with the employer. Despite sitting in negotiations with the employer—which made communication about a projected course of action not only easy, but also quite natural—the union in *Houston Shopping News*, just as Union here, failed to even mention, let alone protest or seek to bargain about, the employer's stated course of action. The union there excused its inaction on the ground it felt the employer's intention to lease out the department was a "joke." The Board ruled in the union's favor on other grounds.

The Fifth Circuit reversed, pointing out the decision conflicted with the Board's own precedent, especially *Hartman Luggage Co.*, 173 N.L.R.B. 1254 (1968). (554 F.2d at 744.) The court also rejected the union's "joke" defense, holding the purpose of the Act is to encourage collective bargaining and, toward this end, open lines of communication are necessary, lines which should not be cut by one party's indifference, whether caused by oversight, misunderstanding, or intent. (554 F.2d at 745.)

Here, Union was informed directly by Company that it would cease Fund contributions. Subsequently, Union learned it had, in fact, ceased such contributions. If Union thought Company's stated course of action was mere "grumbling," a "loose verbalism," or a "joke," all it had to do was ask about it. By asking, it would have kept open the lines of communication. Instead, Union remained absolutely silent—for months. At the very least, Union undermined the collective bargaining process that, as the Fifth Circuit held, underlies the Act itself. It thereby waived the right to bargain about the issue under long and well established law. (*S & W Motor Lines, Inc.*, 236 N.L.R.B. 938, 953-54 (1978), modified on other grounds, 621 F.2d 598

(4th Cir. 1980) [union with one month's notice that employer would cease health, welfare and pension contributions waived right to allege unilateral change where there was no timely notice it disagreed or attempt to bargain about it]; compare *Medicenter Mid-South Hospital*, 221 N.L.R.B. 670, 678-79 (1975); *Citizen's National Bank of Willmar*, 245 N.L.R.B. 389, 389-90 (1979), *enforced*, 644 F.2d 39 (D.C. Cir. 1981) [employer announced a work schedule change to be effective a week later; day after change went into effect union protested, but it did not seek to bargain about it].)[14]

Here, Union had between three and four months to bargain or protest before Company's planned cessation could become effective and it did neither. Moreover, Union *never* requested bargaining, and by the time it finally protested Company's actions, over six months had passed since Company had actually stopped making Fund contributions.

Until this case, the Board never held an employer's notification to a union, and a union's response, must rise to the level of a "clear and unequivocal" waiver. But even if that requirement made sense in some contexts, it is impossible

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[14]Additional examples include *Emeryville Research Center*, 184 N.L.R.B. 504 (1970) [union protest delayed until one day before employer action]; *Holiday Inn Central*, 181 N.L.R.B. 997 (1970) [union had a "few days" notice before employer action, and failed to protest or request bargaining]; *Hartmann Luggage Company, supra*, [union did not protest, or seek bargaining about lay-offs even though already in contract negotiations]; *Justesen's Food Stores, Inc.*, 160 N.L.R.B. 687 (1966) [union, even though in contract negotiations with employer, did not protest or seek bargaining about automation that resulted in lay-offs]; accord, *Clarkwood Corporation*, 233 N.L.R.B. 1172 (1977).

here to determine whether Union's failure to request bargaining was clear and unequivocal, inadvertent, lazy, Machiavellian, or anything else. The Union took no action, and said no word. Therefore, there is nothing to analyze from a "clear and unequivocal" standpoint. In such cases, it is quite possible a union, by its long inaction, intentionally lulls an employer into a planned trap. Prohibiting parties from just such duplicitous schemes is a major if not the prime objective of the waiver doctrine.

The Board's decision, and the enforcement order by the court below, not only are clearly aberrant decisions, but espouse bad policy. This Court should, therefore, prevent these rulings from creating confusion and uncertainty with respect to the well settled requirements of employers and unions to keep their lines of communication open in the collective bargaining process.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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**(Appendices follow)**

## Appendix A

United States Court of Appeals
For the Ninth Circuit

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Nos. 82-7604, 82-7748

NLRB # 32-CA-3222, 264
NLRB-183

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American Distributing Company, Inc.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

[Filed Sept. 6, 1983]

Petition for Review and
Cross-Application for Enforcement of an Order
of the National Labor Relations Board
Argued and submitted June 15, 1983

OPINION

Before: Merrill, Tang, and Nelson, Circuit Judges.

Tang, Circuit Judge:

American Distributing Company, Inc. (the Company) seeks review of an unfair labor practice order issued by the National Labor Relations Board (the Board).[1] The Board filed a cross-application for enforcement of the order.

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[1]The Board's Decision and Order is reported at 264 N.L.R.B. 183 (1982).

The Board found that the Company had violated sections 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1), (5), by discontinuing pension trust fund contributions unilaterally upon the expiration of the collective bargaining contract between the Company and Teamsters, Chauffeurs, Warehousemen and Helpers Local 386 (the Union). The Company does not dispute that it discontinued the contributions, and we find that the Company's defenses lack merit. Accordingly, we enforce the Board's order.

*FACTS*

Since 1954 the Union and the Company have had a collective bargaining relationship which has included a pension plan for employees funded by employer contributions. From at least 1971, the Company has been dissatisfied with the pension trust fund contributions.

During the negotiations that produced the collective bargaining agreement in effect from May 1, 1977 to April 30, 1980, the Company stated that it would agree to continue pension contributions only for the term of that contract. At the insistence of the Company, the 1977 contract omitted a clause proposed by the Union specifying that the pension agreement could not be modified or terminated without the written consent of the pension fund trustees. Also at the insistence of the Company, the pension certification stated that the Company was signing under protest, and that the pension agreement was to expire on April 30, 1980.

In February and April 1980, the Company repeated its intention to discontinue established pension trust fund con-

tributions upon the expiration of the existing collective bargaining contract. When the Company and the Union commenced formal contract negotiations on May 1, 1980, Union negotiator John Souza asked whether the Company was serious about discontinuing the pension contributions. Robert Lee, the Company representative, replied that the Company was serious about doing so. The Company in fact ceased making pension trust fund contributions as of May 1, 1980.

By letter dated December 8, 1980, the Union protested the Company's cessation of pension contributions. On December 29, 1980, the Union filed an unfair labor practice charge with the Board, alleging that the Company had violated the Act by failing to maintain established conditions of employment during negotiations for a new collective bargaining contract.

The Board, in agreement with the Administrative Law Judge (ALJ), rejected the defenses raised by the Company and found that the Company had violated sections 8(a)(1) and (5) of the Act by discontinuing the pension contributions. The Board ordered the Company to make those pension contributions that would have been made absent the Company's unlawful unilateral discontinuance. The Company was obliged to make payments until it negotiated in good faith with the Union and reached an agreement or impasse.

The Company thereafter filed a petition for review and the Board filed a cross-application for enforcement.

*ANALYSIS*

I

Violation of Sections 8(a)(1) and (5)

An employer may not unilaterally institute changes in established terms and conditions of employment that constitute mandatory subjects of bargaining. 29 U.S.C. § 158 (a)(5), (d); *see Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). The prohibition against unilateral changes extends past the expiration of a collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse. *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Because contributions to an employee pension trust fund constitute a mandatory bargaining subject, an employer may not make unilateral changes in pension fund contributions. *Id.* at 1213-14. An employer who does make such unilateral changes has committed an unfair labor practice in violation of sections 8(a)(1) and (5) of the Act.

The Company does not dispute that it discontinued the pension trust fund contributions upon the expiration of the 1977-80 contract. Instead, the Company claims that: (1) the Union waived its right to object by contract and by inaction; (2) under section 302 of the Labor Management Relations Act (LMRA), the pension trust fund could not legally accept and the Company could not legally make further contributions; and (3) the charge is time barred by section 10(b) of the Act, 29 U.S.C. § 160(b).

The Board concurred with the ALJ's decision to reject these defenses. We enforce the Board's order if the Board correctly applied the law and if the Board's findings of fact are supported by substantial evidence in the record

viewed as a whole, even if we might have reached a different conclusion based on the same evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Nevis Industries*, 647 F.2d 905, 908 (9th Cir. 1981).

A. The Waiver Defenses

1. Contractual Waiver

In collective bargaining, a union may waive a right that is protected by the Act. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430-31 (1967). A waiver must generally be clear and unmistakable. *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981). Waivers occur by express contractual provisions, by bargaining history, or by a combination of the two. *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). The bargaining history establishes relinquishment of a mandatory bargaining subject only if past negotiations reveal that the subject was "fully discussed or consciously explored" and the Union "consciously yielded" its interest in the matter. *Tocco Division of Park-Ohio Industries, Inc. v. NLRB*, 702 F.2d 624, 628 (6th Cir. 1983) (quoting *C & C Plywood Corp.*, 148 N.L.R.B. 414, 416 (1965), *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), *rev'd*, 385 U.S. 421 (1967)).

We reject the Company's contention that the 1977 collective bargaining agreement and the pension trust certification constituted a contractual waiver of the statutory right to bargain over pension plan changes. The Company argues that the combination of three factors showed an unequivocal waiver: (1) the pension certification was amended to state that it would expire when the collective bargaining

agreement terminated; (2) the Company successfully insisted upon exercising a contractual provision that required pension trust approval before stopping pension contributions; and (3) the Company clearly stated to the Union that it would cease making pension fund contributions when the 1977 agreement expired.

We need not decide the unique question whether a contractual waiver of a mandatory bargaining subject may ever survive the termination of a contract. The Board concluded that the evidence was insufficient to show an unequivocal waiver. We give deference to this conclusion because alleged contractual waiver of a protected right is a question that falls within the area of the Board's special expertise. *NLRB v. Southern California Edison Co.*, 646 F.2d at 1367. Furthermore, substantial evidence supports the factual findings on which the Board based its conclusion that the Union had not waived the right to bargain on pension contributions when the 1977 agreement expired.

The Union's abandonment and foregoing of the contractual provision is insufficient to constitute a waiver of its statutory right to bargain. *See id.* at 1366. Also any inferences that may be drawn from the parties' bargaining history and the amendment of the pension certification are insufficient to overcome the deference we owe to the Board's findings. *Id.* at 1366-67; *see also NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 304 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) (great deference given to the inferences drawn by the Board from testimony credited by the ALJ). We uphold the Board's finding that an unequivocal contractual waiver did not occur.

2. Waiver by Union Inaction

In addition to the contractual waiver defense, the Company contends that the Union waived its statutory right to bargain during the 1980 discussions by failing to object or seek bargaining over the Company's announced intention to discontinue the established pension contributions.

To assert successfully a waiver-by-inaction defense, an employer must show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change. *See NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981); *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 918-19 (D.C. Cir. 1972). Moreover, the employer must demonstrate that the union failed to make a timely bargaining request before the change was implemented. *Id.* Conjecture, rumor or gossip does not constitute clear notice. *See NLRB v. National Car Rental Systems, Inc.*, 672 F.2d 1182, 1188 (3d Cir. 1982); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961).

As early as 1977, the Company informed the Union that its pension contributions would cease in 1980. The Company's negotiators also informed the Union on three occasions in 1980 that the Company planned to discontinue contributions at the termination of the 1977-80 contract.[2] The

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[2]In February 1980, Sommerfeld, the Company negotiator, told Souza, the Union negotiator, that the Company would stop making pension contributions at the expiration of the 1977-80 contract unless they had already reached a new agreement that would obligate them to continue the contributions. In April 1980, the Company negotiator told Souza that "we were going to discontinue the pension contributions at the expiration of the contract. . . ." Again, on May 1, 1980, at the first formal negotiation session, the Company negotiator responded to Souza's question whether the

ALJ determined, however, that the Company's "loose verbalisms" did not constitute clear notice to the Union, and the Board asserts that the Company's statements were merely expressions of dissatisfaction made during informal meetings between the Union and Company negotiators. [Yet we need not reach the issue whether the Company's notice to the Union was adequate.

The resolution of this waiver issue does not depend on the significance attached to the Company's three 1980 statements. Substantial evidence supports the ALJ's finding that the Union made a request to bargain about the pension plan contributions on May 1, 1980. This bargaining request is sufficient to defeat the waiver-by-inaction defense. *See International Ladies' Garment Workers Union*, 463 F.2d at 919.] [*]

B. The Section 302 Defense

Under section 302 of the LMRA, an employer may make payments to a pension fund and the trust may accept them only if "the detailed basis on which such payments are to

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Company was serious about discontinuing pension contributions by stating: "Yes we were. As far as we were concerned it was like throwing it out the window." We need not decide whether these assertions constitute adequate prior notice.

Moreover, even if the Company's contention is true, that Souza had notice of the nonpayment in July, such notice does not support the Company's waiver defense. Only clear notice conveyed sufficiently in advance of the implementation of the change to allow reasonable scope for bargaining would have been sufficient to support a waiver defense. *See NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981) (notice given after a change in established terms of employment cannot support a waiver defense).

[*Bracketed text deleted, and new text and footnote 3 added, on rehearing. (See App. pp. 13-14, *infra*.)]

be made is specified in a written agreement with the employer." 29 U.S.C. §186(c)(5)(B). Section 302 was enacted to ensure that employee benefit trust funds are used for the sole benefit of the employees of the companies that make the contributions. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981).

The Company contends that letters from the pension trust fund clearly establish that the trust could not and would not accept or retain Company contributions beyond April 1980. The Company incorrectly concluded that it was entitled, or even required, under section 302 not to make further pension contributions. The Union, of course, was not bound by the letters sent by the pension trust. *See id.* at 330-34 (the trustees of a pension trust fund are independent and distinct from both the employers and the unions participating in the fund).

The Board properly found that the Company had an obligation to continue the pension contributions absent a bargaining impasse or a waiver from the Union. Because a written agreement—the expired contract—specified the basis on which the Company was legally obligated to make contributions, the literal language and underlying purpose of section 302 has been satisfied. *See Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981).

The Company asserts that this case is distinguishable from *Producers* and *Peerless* because here both the collective bargaining agreement and the pension trust certification have expired. In *Peerless*, the trust fund agreement was still valid. 641 F.2d at 736. Nonetheless, the unequivo-

cal language of *Producers* states that an employer is required to maintain the status quo and make payments in conformity with the terms of an expired written agreement. 654 F.2d at 627. Accordingly, we hold that the Company's section 302 defense fails.

C. The Section 10(b) Defense

Section 10(b) of the Act establishes a six-month statute of limitations for the filing of an unfair labor practice charge. 29 U.S.C. § 160(b). The limitation period does not begin to run until the party filing the charge receives actual notice that an unfair labor practice has occurred. *Peerless Roofing*, 641 F.2d at 736.

The ALJ credited Souza's testimony that on November 24, 1980, he learned for the first time that the Company had not made pension contributions since May. The ALJ concluded that the charge was timely filed on December 29, 1980. The Company, however, contends that the Union received sufficient notice as early as February 1980.

Because notice of the intention to commit an unfair labor practice does not trigger section 10(b), *see NLRB v. R. O. Pyle Roofing Co.*, 560 F.2d 1370, 1372 (9th Cir. 1977), only notice received after the Company missed its first pension fund payment could have provided actual notice to the Union. Consequently, the relevant time period is May and June 1980. Even if Souza became aware of the nonpayments in July, as the Company contends, the charge was filed within six-months thereafter and is timely.

The only statement within the relevant period was made on May 1, 1980. The Board had substantial evidence before it from which to conclude that this statement did not con-

stitute actual notice. We defer to the reasonable inferences drawn by the Board from the testimony credited by the ALJ. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d at 304.

## II

### Due Process Considerations

The Company asserts that the Board violated due process by issuing an open-ended remedial order that requires the Company to make pension contributions until the Company negotiates in good faith with the Union reaching a new contract or impasse. The parties litigated this case with the understanding that any Company liability would cover only the period from April 30, 1980—when the Company ceased making pension contributions—until December 21, 1980, the date set by the pension trust fund on which it would refuse to accept further contributions without a new written agreement.

The Company correctly states that the Board violates procedural due process and fundamental fairness when it finds violations of the Act neither charged in a complaint nor litigated. *See Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 162-64 (8th Cir. 1968). We do not decide whether a finding that the company's liability extends beyond December 21, 1980 would impinge upon principles of due process or fundamental fairness because no such findings have been made.

The Board has not yet ruled on the proper scope of the remedial period. The Board's order requires the Company to pay only those contributions "which would have been [paid] absent [the Company's] unlawful unilateral discontinuance of such payments." The Board concedes that this

order contemplates that the Company is relieved of any obligation to make contributions which it can show would not have been accepted by the trust fund.

The Board has the discretion to compute the amount of an award and to make factual determinations affecting the amount of the award at a compliance hearing following enforcement of its order. *E.g., NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers,* 600 F.2d 770, 778-79 (9th Cir. 1979), *cert. denied,* 445 U.S. 915 (1980). Because this has not yet occurred, it is premature for us to conclude that the Board's award includes payments beyond December 21, 1980. Therefore, the Company's due process and fundamental fairness contentions are not ripe for consideration.

*CONCLUSION*

The Board's finding that the Company committed an unfair labor practice is supported by substantial evidence. Review of the remedial order is premature.

The order is enforced; the petition for review is denied.

**Appendix B**

In the United States Court of Appeals
For the Ninth Circuit

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Nos. 82-7604, 82-7748
NLRB # 32-CA-3292, 264
NLRB-183

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American Distributing Company, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

[Filed Nov. 7, 1983]

ORDER

Before: Merrill, Tang and Nelson, Circuit Judges.

The opinion in this case is amended as follows:

Delete the text from page 7, line 22 beginning with the word "Yet" through Page 8, line 5.[*]

The following shall be substituted in its place:

A footnote* shall be indicated after the word "negotiators" on page 7 line 22 and the following text consisting of two paragraphs shall be inserted thereafter commencing with a new paragraph at line 23:

Substantial evidence supports the Board's determination. Company negotiators had protested the established con-

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[*See App. p. 8, *supra*.]

tributions during every round of contract negotiations since 1971. Yet the Company had never before discontinued contributions. In 1977, during a four-month period in which no contract existed, the Company had continued the established contributions. In light of this bargaining history, the ALJ and the Board could properly conclude that the Company had not provided clear notice to the Union.

This result is consistent with our recent decision in *Stone Boat Yard v. NLRB,* No. 82-7594, slip op. at 4290 (9th Cir. Sept. 6, 1983), in which we held that an employer must give express notice of specific proposals before implementing unilateral changes. *Id.* at 4294. We noted that an express notice requirement facilitates open discussions by informing the unions of what might be lost if they fail to object or seek bargaining. *Id.* Here, the Company's statements of dissatisfaction failed to put the Union on notice that, contrary to past practices, the Company would withhold pension contributions during the period between contracts.

The following text shall be inserted for a new footnote 3:

> [3]Even if the Company's contention is true, that Souza had notice of the nonpayment in July, such notice does not support the Company's waiver defense. Only clear notice conveyed sufficiently in advance of the implementation of the change to allow reasonable scope for bargaining would have been sufficient to support a waiver defense. *See NLRB v. Crystal Springs Shirt Corp.,* 637 F.2d 399, 402 (5th Cir. 1981) (notice given after a change in established terms of employment cannot support a waiver defense).

As above amended the members of the panel (Judges Merrill, Tang and Nelson) have voted unanimously to deny the petition for rehearing.

**Appendix C**

264 NLRB No. 183

United States of America

Before the National Labor Relations Board

Case 32—CA—3293

American Distributing Company, Inc.

and

General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

DECISION AND ORDER

On March 3, 1982, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

cided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, American Distributing Company, Inc., Modesto, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. September 30, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

[1]We hereby disavow the gratuitous comments made by Administrative Law Judge Heilbrun in the penultimate paragraph of the fact section of his Decision, entitled "Findings of Fact and Resultant Conclusions of Law," regarding the bureaucratic operation of the Union's pension trust fund.

## Appendix D

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

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Case 32-CA-3293

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American Distributing Company, Inc.

and

General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Kenneth H. Ko, for the General Counsel.
Michael W. O'Neil, Walnut Creek, CA for Respondent.

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### DECISION

### Statement of the Case

David G. Heilbrun, Administrative Law Judge: This case was heard at Modesto, California, on September 16 and 17, 1981 based on a complaint alleging that American Distributing Company, Inc., called Respondent, violated Section 8(a)(1) and (5) of the Act by unilateral discontinuance of contributions to a pension plan, assertedly done without notification to or bargaining with General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, called the Union.

Upon the entire record,[1] my observation of witnesses and consideration of post-hearing briefs,[2] I make the following:

## Findings of Fact and Resultant Conclusions of Law

These parties have had a collective bargaining relationship since about 1954, which led to establishment of a typical pension plan for employees funded by company contributions.[3] The rate of such contributions is contractually geared to hours worked by employees, ranging from a monthly amount for full-time service down to mere hourly amounts for limited part-time employment. The most recent collective bargaining agreement between the parties was effective from May 1, 1977 through April 30, 1980.[4] This agreement was actually reached in September 1977, but to have retroactive effect. Contemporaneously Respon-

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[1]I grant General Counsel's unopposed motion to correct transcript in six particulars.

[2]At pp. 2 and 19 of Respondent's brief I read the date May 1, 1981, as May 1, 1980.

[3]Respondent maintains its office and place of business in Modesto, California, where it is engaged in the non-retail wholesaling of lumber and other building materials, annually purchasing and receiving goods or services valued in excess of $50,000 directly from suppliers located outside California. On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Section 2(5).

[4]The appropriate unit which this case concerns is one of all full-time and regular part-time truck drivers, lift truck operators, lumber handlers, clerks and tallymen, combination yard and servicemen, leadermen and/or working foreman, employed at Respondent's Kansas Avenue location, with customary exclusions.

dent executed a union pension certification,[5] this having already been done by the Union. The signature of plant manager Bart Perdue appeared below words of protest " . . . as per the previous agreement." Merle Mensinger, Respondent's credit/personnel manager and joint owner, and August Sommerfeld, Respondent's negotiator at the time as a representative of the Sequoia Employers Council, each testified that they had harbored long-standing dissatisfaction with the Teamster pension plan at this point in 1977 of again yielding to it, and that this opposition was expressed most clearly at the time to Union representatives Norbert Miller and John Souza.

On February 21, 1980, Respondent sent the Union a standard notice of desire to terminate ". . . any written, expressed or implied agreements, and any agreements by reference or otherwise", and to meet for single employer bargaining pursuant to Section 8(d). This letter was signed by Robert Lee, who with Kenneth Huggins and both as Sequoia Employers Council representatives, would chiefly negotiate for Respondent. By this time Sommerfeld was removing himself from regular negotiations for clients, and Souza was to primarily represent the Union.[6] Souza soon telephoned Sommerfeld and the two met preliminarily and informally. On the conflict of testimony as to what was said during this meeting I credit Sommerfeld that he essentially groused about the pension plan as long abhorred by the company, and he verbalized the spectre of Respondent re-

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[5] As to economics the certification simply called for a 55 cent contribution for all hours worked, with five cent increases to this amount on each anniversary date of the contract.

[6] All dates and named months hereafter are in 1980, unless shown otherwise.

fusing to pay into the fund beyond termination date of the existing contract. Lee then chancedly met Souza in early April, and again a conflict exists about the brief discussion of that time. As with the Sommerfeld exchange above, I am not convinced that Souza was sufficiently attuned to remarks made, nor that his recollection is particularly reliable. Here, too, I credit Lee to the extent of believing that he commented about the Teamster pension plan versus a long sought company-sponsored profit sharing plan, and made at least verbal reference to inevitably discontinuing contributions toward the former.

The parties commenced formal negotiations on May 1 by Lee and Huggins meeting with Souza, who presented a brief list of Union demands including one for increase in pension contributions. Numerous meetings followed this, in which Respondent's representatives pressed for acceptance of a profit sharing plan in lieu of the Teamster pension plan. In fact Respondent did cease any contributions from and after May 1, and this was first openly disclosed in a letter dated September 23 from Mensinger to the pension trust in which he referred to the absence of a contract with the Teamsters since May 1 and that contributions had not been made nor did Respondent "intend to . . . as long as this condition exists."

Governance of this pension plan is, as typically so, by trustees of the Western Conference of Teamsters. The trust in turn engages Northwest Administrators as an administrative agent, one of whose functionaries is Judie Turner, a contract supervisor. Respondent's failure to pay was first documented by the trust office issuing notice of delinquency, a mail-gram and a form letter, all sent to Respondent

within a ten day period of late July. The summarizing letter of July 28 noted lack of pension contributions for May and June, which warranted referral of the matter to collection attorneys. A copy of this letter went to the Union.

As a separate line of correspondence, and in accordance with policies of the time, a contract review clerk with Northwest Administrators issued form letters on August 7 and again September 9 advising the Union that no new labor contract had been received in reference to American Distributing, and this was increasingly tending to conflict with the fund's ability to accept, retain and invest any contributions as might have come in since last contract expiration date. Such letters also alluded to the necessity of a pension certification pertaining to any new labor agreement. A letter of similar import was sent to the parties on October 21, this time with more insistent request for advice on the status of things.

On November 21, Turner sent the following to both parties by certified mail:

> Our records indicate that your Labor Agreement, covering the employees reported under the employer account number listed above, expired as of April 30, 1980. As of this date, we have not received a copy of the renewed agreement. (Please note that if you have already forwarded a written Labor Agreement and a signed Employer-Union Pension Certification to this office for the above-referenced account, please disregard this letter.)
>
> This letter is to notify you that if a written agreement is not furnished to us within thirty (30) days from the date of this letter, no further contributions will be accepted, all contributions received by the Trust during the period when no written Labor Agreement

was in effect shall be deposited in a separate account, and any annuities inadvertently purchased during that period will be cancelled or adjusted. Additionally, the Employer Pension Account will be dropped.

We would appreciate it if you would send us a copy of all written Labor Agreements covering the time period May 1, 1980 through this date.

Souza testified that this came to his attention on November 24, and in an exchange of telephone calls shortly following he learned, assertedly for the first time, that contributions had not been made to the pension fund since May. Confirming the last of these contracts, Souza advised Turner in writing that the parties were in negotiations. He thereupon sent Respondent a certified letter dated December 8 requesting that the delinquency be cured within five days, without which Souza would seek N.L.R.B. relief. A negotiating session also took place that day, at which time certain modified proposals of the Union were presented that included a continuing demand for increase in the Teamster pension plan contributions but did not rule out consideration of profit sharing on which the Union needed more information. When matters did not appreciably change, Souza filed the charge upon which this proceeding is based on December 29.

On this fact situation General Counsel contends that plainly an unlawful unilateral change in terms and conditions of employment has been made, and no anticipated defense can avoid finding a violation of the Act. Respondent does raise all and more of the anticipated defenses, arguing as follows:

1. Contract Law—that events contemporaneous with reaching the 1977-80 contract created a condition

causing the entire pension plan dynamics to expire with the contract.

2. Section 302(c)(5)—that policies of the trust, and correspondence relative thereto, taken in connection with the provisions of Section 302(c)(5) of the Act,[1] removed any entitlement of the trust to accept and retain contributions after May 1.

3. Waiver—by the Union's inaction in the face of employer advice.

4. Consent—by the Union's unconcern with whether or not contributions were suspended.

5. Section 10(b)—that expiration of six months from May 1 made the unfair labor practice charge untimely when filed in December.

In *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970) the Board held that pension fund plans once part of a collective bargaining agreement constitute an aspect of employee wages and terms and conditions of employment which survives expiration of the contract. For this reason an employer may not unilaterally alter the payments into such a plan unless: (1) The changes are made subsequent to the parties reaching a bargaining impasse and the union has rejected the changes prior to the impasse, (2) the employer demonstrates that, at the time the changes were made, the union did not represent a majority of the unit employees or that the employer had a good-faith doubt, based upon objective considerations, of the union's continuing majority status, or (3) the union has waived its

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[1]This provision of the statute makes lawful the payment into a trust fund established by a representative of employees (in an industry affecting commerce), which fund exists for the sole and exclusive benefit of employees of such a paying employer, and their families and dependents.

right to bargain regarding the changes. Here Respondent did not even present its profit sharing plan until transmitting it by letter in early July, while the Union's stance on modified proposals showed that as late as December it was still willing to consider this alternative. Thus the first exception to *Hinson* is not present, and no contention is made that would remotely involve the second one respecting good faith doubt of the Union's continuing majority status. The matter of waiver is what remains, and here Respondent points both to circumstances of the 1977 contract wrap-up and to verbal exchanges of spring 1980.

Mensinger and Sommerfeld each testified that Respondent had agreed to contributions for the pension plan and over the years 1977-1980 because of strike threat at the time of reaching that contract, but their remarks to Souza indicated they meant only to agree for the coming three year period. I credit their recollections on this subject over Souza's inability to remember whether or not such verbalisms passed. I have previously found that connective remarks emanated from Sommerfeld and Lee prior to the advent of negotiations, but more importantly Lee and Huggins testified that there was express re-affirmation of Respondent's intention to discontinue the contributions, a contrary course being termed "like throwing money out the window." I find such a remark to have been made by again crediting Respondent's witnesses over Souza, who on general demeanor grounds and from standpoints of hesitancy or evasiveness did not impress as a particularly reliable witness. I temper this belief with the further observation that it does not seem an intent to deceive is at work with Souza, simply that he did not give particular attention to dialogue that was not directly in point to reaching a renewal contract in terms of the subjects he

had first presented for bargaining. Notably profit sharing was not among these, and Souza would be more aptly concerned with fundamental language matters and economics, rather than extending a sensitive or sympathetic ear to a matter of mere-total disconcern or irrelevance to him.[8] However the law has settled that technical waiver of a substantial subject for bargaining must occur in clear and unequivocal fashion. The loose verbalisms of 1977 and early 1980 do not approach this level, and the fact that Souza brushed them off without deigning to argue back, resist or protest does not permit the concept of waiver to attach to his conduct or inaction. This conclusion subsumes Respondent's contentions as literally also raised from contract law principles and from the assertion that Souza, on behalf of the Union, consented to the discontinuance. Neither is it established that the pension certification executed in 1977 is a basis of finding waiver. Pertinent language from this document reads:

> The undersigned employer and Union hereby certify that a *written* pension agreement (in most cases a Teamsters collective bargaining agreement) is in effect between the parties providing for contributions to the Western Conference of Teamsters pension trust fund and that such pension agreement conforms to the trustee policy on acceptance of employer contributions (as reproduced on the reverse of this form) and is not

[8]Souza had canvassed his membership following the employer's re-opener notice of February 21, and it would be the expressed objectives of this group that would most fully motivate his awarenesses going into negotiations. Notably he had opened bargaining with a demand for $1 per hour pay increase in each of the proposed 3-year term, and by December 1980 was still seeking half this amount. Such mainstream goals are more than enough to divert the Union's chief negotiator, apart from the jaded reaction that would exist upon hearing opposition rhetoric on the long-festering topic.

> otherwise detrimental to the plan. A complete copy of the pension agreement (labor contract) is attached or, if not yet available, will be furnished to the area administrative office as soon as available. The undersigned further certify that the following information is true and correct and accurately reflects the provisions of the pension agreement:

Such language does no more than ministerially attach to the enabling collective bargaining agreement for verification and collection purposes, without doing more than make reference to a contract termination date and decidedly not as to constitute a clear or unequivocal waiver of the policy basis upon which such a benefit should survive the contract expiration. See *Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260 (1976). Finally Respondent points to excised language in the 1977-80 agreement by which, but for agreed nullifying action by the parties, the trust would have had to consent to any discontinuance of payments. Here, too, there is a failing of unequivocalness, for striking this certain Section 704 had to do only with the nature and mechanics of the relationship between Respondent and the trust, but not as to create a waiver of employee rights. *Cf. Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB No. 115.

It is also unavailing for Respondent to raise Section 10(b). It was not Souza's obligation to speculate on whether or not Respondent would follow through on its grumblings and avoid a financial obligation to which it was committed by operation of labor-management relations law. The monolithic workings of the trust and its administrative arm does not admit to convenient or natural inquiry by a business representative for one of the locals served, and while I am satisfied that correspondence as early as July would have

at least come to Souza's passing attention, even this did not expressly show that contributions were being missed. Indeed it is Respondent that failed to do the simple act of officially advising Souza in writing of such a critical step when taken in May, or of even providing his office a copy of their notifying letter to the trust on September 23. The sheer inflexibility, bureaucratic inertia, and lack of cross-communication among and between the large entities involved is nowhere better illustrated than by seeing how almost fully a month after Respondent boldly assumed their position, and did so in writing, that the contract review clerk for Northwest Administrators would still ploddingly do the futile act represented by her letter of October 21. I see no reason to fix a date of commission of unfair labor practices, for Section 10(b) purposes, any earlier than November 24, and thus hold the charge to be timely.

Accordingly, I render a conclusion of law that Respondent, by unilaterally discontinuing contributions to the Western Conference of Teamsters Pension Trust Fund, without prior notification to or bargaining with the Union, has engaged in unfair labor practices within the meaning [of] Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Disposition

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:*

*In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

## ORDER

Respondent, American Distributing Company, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unilaterally ceasing payments into the Union's pension trust fund.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make its employees whole by paying all pension fund contributions, as provided in the expired collective bargaining agreement, which have not been paid, and which would have been absent Respondent's unlawful unilateral discontinuance of such payments, and continue such payments until such time as Respondent negotiates in good faith to a new agreement or to an impasse.[10]

(b) Post at its Modesto, California, place of business copies of the attached notice marked "Appendix."[11] Copies

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[10]I do not provide for interest on such amounts, nor does this recommended Order contemplate that further proceedings might not be necessary to fully remedy any losses attributable to this unlawful action. See *Henry Cauthorne, supra.*

[11]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: March 3, 1982

/s/ DAVID G. HEILBRUN

David G. Heilbrun
Administrative Law Judge

## APPENDIX

### Notice To Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT unilaterally cease making payments into the Western Conference of Teamsters Pension Trust Fund as established in a past collective bargaining agreement between us and General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL make employees whole by paying all pension trust fund contributions which were stopped in May 1980, and continue such payments until such time as we negotiate a new agreement with the Union or bargain to an impasse.

AMERICAN DISTRIBUTING
COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

**Appendix E**

United States Court of Appeals
For the Ninth Circuit

NLRB# 32-CA-3292, 264-NLRB-183
No. 82-7604 & 82-7748
Northern California

American Distributing Company, Inc.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

JUDGMENT

Upon Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board on June 15, 1983 and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said National Labor Relations Board in this Cause be, and hereby is ENFORCED.

Filed and entered: September 6, 1983

**Appendix F**

United States Court of Appeals
For the Ninth Circuit

No. 82-7604
82-7748
NLRB # 32-CA-3292, 264
NLRB-183

American Distributing Company, Inc.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

[Filed Nov. 15, 1983]

ORDER

Before: Merrill, Tang, and Nelson, Circuit Judges.

The court has considered the Petition for Rehearing. The Petition for Rehearing is denied.

## Appendix G

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time and pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made,

and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either

party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employ-

ees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

§ 186. Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the pur-

pose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose estab-

lished duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care,

pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative

for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso of clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other things of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceedings directed (i) against any such employer or its officers or agents in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor

Relations Act, as amended [29 U.S.C. §§ 151-158, 159-168], or this Act [29 U.S.C. §§ 141-144, 151-158, 159-167, 171-183, 185-187, 557]; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. §§ 153, 158, 159, 160, 164, 186, 187, 401-402, 411-415, 431-441, 461-466, 481-483, 501-504, 521-531].

(d) Any person who willfully violates any of the provisions of this section shall upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52) and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act [June 23, 1947],

until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

FILED
FEB 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1357

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1983

AMERICAN DISTRIBUTING COMPANY, INC.,
*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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fraction thereof worked into the following service year. Such pro-rata payments shall not apply in cases of discharge for good cause.

5.08 In the event two or more employees in the same yard request the same vacation period, the senior employee shall have first preference.

5.09 Employees will indicate their vacation period choice prior to April 1 of each year and a vacation schedule will be posted in each yard by April 1.

ARTICLE VI *EMPLOYEE BENEFITS:*

*Hospital-Medical, Dental, Orthodontics, Drug, Vision and Retired Hospital-Medical Benefits:*

6.01 The Employer agrees to a fully paid employee's Hospital, Medical, Dental, Orthodontia, Drug, Vision and Retired Hospital and Medical coverage for each eligible employee and their dependents for the life of this Agreement.

6.02 Effective July 1, 1977, Hospital, Medical coverage, including the retired coverage shall be provided under Northern California General Teamsters Policy No. 1200 LCZ, Class 1, at a cost of Seventy-nine Dollars and Sixty-one cents ($79.61) per month per eligible employee. Administration shall be by Valley Administrators, 1118 North El Dorado St., Stockton, CA 95202.

6.03 Effective July 1, 1977, Prescription Drug coverage, Dental coverage (100% of mean fee), Orthodontia coverage, and Vision care shall be provided at a cost of $37.79 per month per eligible employee and shall

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[Exhibit consists of two pages from the 1977 Agreement and thus begins in mid-sentence.]

be administered by Valley Administrators, 1118 North El Dorado St., Stockton, CA 95202.

6.04 The term "eligible employee" as used herein, shall mean any employee who is scheduled to work eighty (80) hours or more monthly for the Employer covered by this Agreement.

6.05 The Employer agrees to abide by the provisions of the Trust Agreements and to adjust to any variation in the rate of contribution that may be ordered by the Trustees acting under proper Trust Agreement procedure.

6.06 At any time during the term of this Agreement, the Employer may exercise its right to select similar benefits through a Carrier of its own choosing.

*ARTICLE VII PENSIONS:*

7.01 The Employer shall pay into the Western Conference of Teamsters Pension Trust Fund for the account of each employee working under this Agreement a monthly sum computed as follows:

| | Effective 5/1/77 | Effective 5/1/78 | Effective 5/1/79 |
|---|---|---|---|
| (a) If the employee works 160 hours or more during the calendar month: | $95.15 per month | $103.80 per month | $112.45 per month |
| (b) If the employee works 40 straight time hours per week but less than 160 hours during the month: | $22.00 per week | $24.00 per week | $26.00 |
| (c) If the employee works more than four hours or by a combination of such weekly and daily rates: | $4.40 | $4.80 | $5.20 |
| (d) If employee works less than 4 hours: | 55¢ per hour | 60¢ per hour | 65¢ per hour |

7.02 Time paid for but not worked, such as holidays, vacation time and sick leave shall be considered as time worked for the purpose of this Article.

7.03 **The total amount due for each calendar month shall be remitted in a lump sum not later than the tenth day of the following month. The Employer agrees to abide by such rules as may be established by the Trustees of said Trust Fund to facilitate the prompt and orderly collection of such amounts and the accurate reporting and recording of such amounts paid on account of the employees. Failure to make payments herein provided within the times specified shall be a breach of this Agreement.**

7.04 **The parties hereby agree that if they enter into a renewal, extension, modification or replacement of the Labor Agreement for a period which includes or follows January 1, 1977 they shall include a provision which requires the Employer to make contributions to the Fund after December 31, 1978, at the rate which is one hundred forty percent (140%) of the highest pension contribution rate in effect under the Labor Agreement prior to January 1, 1979.**

**The parties agree that because the Trustees of the Fund will rely on the execution of this document to restore or not to reduce benefits to retiring employees as indicated above, this Agreement may not be modified, terminated, or rescinded by the parties, directly or indirectly, without the express written consent of the Trustees.**

*B.W.P.* *N.F.M.*

**The Company agrees to sign Addendum to Labor Agreement attached as part of this contract proposal and trust instrument.**

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[Typed in material is indicated by bold type and hand written material is indicated by italics.]

## Appendix I

The Western Conference of
Teamsters Pension Trust Fund

Employer—Union Pension Certification

(Must be completed and forwarded to administrative office for all new employers or upon labor contract renewal)

The undersigned employer and union hereby certify that a WRITTEN pension agreement (in most cases a Teamsters collective bargaining agreement) is in effect between the parties providing for contributions to the Western Conference of Teamsters Pension Trust Fund and that such pension agreement conforms to the trustee policy on acceptance of employer contributions (as reproduced on the reverse of this form) and is not otherwise detrimental to the plan. A complete copy of the pension agreement (labor contract) is attached or, if not yet available, will be furnished to the area administrative office as soon as available. The undersigned further certify that the following information is true and correct and accurately reflects the provisions of the pension agreement:

Name of Employer—**American Distributing**

Name of association

If an association with authority to sign on behalf of employers, attach list of names and addresses of each such employer.

Street address—**541 Kansas Ave.**

City, State and zip code—**Modesto, Ca. 95351**

Effective date of this pension agreement—**May 1, 1977**

Expiration date—**April 30, 1980**

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[Typed in material is indicated by bold type and hand written material is indicated by italics.]

First pension contribution due **June 1, 1977** based on **May, 1977** employment under this pension agreement.

(Month)

Hourly rate **$.55** based on all hours.

Other

(Describe)

Flat rate: per day $ Per Week $ Per month $

If other basis, explain—**Pursuant to labor agreement—May 1, 1977 to April 30, 1980**

If this pension agreement provides for an automatic increase in pension contributions during its term, please specify:

| | |
|---|---|
| Effective date 5/1/78 | New rate $.60 |
| Effective date 5/1/79 | New rate $.65 |
| Effective date | New rate $ |

Indicate:

New pension account Renewal **XX**

Employer name or ownership change

For pension agreement renewals:

If completed by the employer on his own behalf indicate pension account number—*015398*

If completed by association, indicate, if possible, account number next to each employer's name on attached list.

Employer is a corporation

Partnership

Unincorporated sole proprietorship

**(Partners or unincorporated owners are INELIGIBLE to participate personally in this tax-exempt trust.)**

**Approximate number of covered employees**

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[Typed in material is indicated by bold type and hand written material is indicated by Italics.]

The undersigned union and employer agree to be bound by the Western Conference of Teamsters Agreement and Declaration of Trust and Plan as now constituted or as hereafter amended, retroactively or otherwise, and to be bound by the acts of their respective union and employer trustees or their successors. Employer agrees to pay to the Western Conference of Teamsters Pension Trust the pension contributions specified in the pension agreement with the union. The undersigned union and employer shall become parties to said agreement and declaration of trust upon acceptance as such by the trustees.

Union—**TEAMSTERS LOCAL NO. 386**
By *N. F. Miller*
(Signature)
Date *6-17-77*

**This is signed under protest as per the previous agreement.**
Employer **AMERICAN DISTRIBUTING**

By *B. W. Perdue*
(Signature)
Date *9/7/77*

Accepted by the trustees of the Western Conference of Teamsters Pension Trust Fund.
By [Signature indecipherable]
Date Sep 21 1977

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[Typed in material is indicated by bold type and hand written material is indicated by italics.]

Supreme Court, U.S.
FILED
APR 11 1984
ALEXANDER L. STEVAS

No. 83-1357

# In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN DISTRIBUTING COMPANY, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing, upon expiration of the contract between petitioner and the Union, the pension fund contributions called for by the contract.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-1357

AMERICAN DISTRIBUTING COMPANY, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 715 F.2d 446. The decision and order of the National Labor Relations Board (Pet. App. A15-A30) are reported at 264 N.L.R.B. 1413.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A31) was entered on September 6, 1983. A petition for rehearing was denied on November 15, 1983

(Pet. App. A32). The petition for a writ of certiorari was filed on February 13, 1984. This Court has jurisdiction under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and of the Labor Management Relations Act, 29 U.S.C. 141 *et seq.*, are set forth at Pet. App. A33-A42.

## STATEMENT

1. Petitioner and the Union [1] have been parties to a series of collective bargaining agreements since about 1954. Under these contracts, the parties established an employee pension plan funded by monthly contributions by petitioner to the Western Conference of Teamsters Pension Trust Fund. Pet. App. A18. Since at least 1971, petitioner has been dissatisfied with the contributions required by the contracts and has stated its dissatisfaction to the Union in every round of contract negotiations. Petitioner has agreed, however, to continue the contributions under each contract. Pet. App. A18-A19; Tr. 60, 66, 213-214, 218-219.[2] When the parties' contract expired in April 1977, petitioner continued to make the pension fund contributions called for by the expired contract until the parties reached agreement on a new contract in September 1977 (Tr. 216, 231-232).

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[1] Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386.

[2] "Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" refers to the General Counsel's exhibits at the hearing, and "RX" refers to the company's exhibits at the hearing.

Although petitioner had expressed dissatisfaction with the contractual contributions during the 1977 negotiations, the 1977 contract provided that petitioner would continue to make monthly contributions to the pension fund and also that it would sign a pension certification attached as part of the contract. During negotiations, petitioner's representatives stated that they were agreeing to the contributions only because of the threat of a strike and only for the term of the contract. Pet. App. A18-A19, A24. At their insistence, the contract omitted a clause proposed by the Union that would have provided that the pension agreement could not be modified or terminated without the written consent of the pension fund trustees. Also at petitioner's insistence, the pension certification provided that petitioner signed it "under protest as per the previous agreement." Pet. App. A16, A19; Pet. Supp. App. A44, A47. Both the collective bargaining agreement and the attached certification were to remain in effect until April 30, 1980; in addition, the collective agreement was to continue in effect from year to year thereafter unless either party gave the other written notice of a desire to modify or terminate it. Pet. App. A18; Pet. Supp. App. A45-A46; GCX 2, at 11.

In February 1980, petitioner notified the Union that it wanted to begin negotiations for a new contract. In late February and early April, Union negotiator John Souza met informally with two of petitioner's negotiators. They conveyed to Souza petitioner's longstanding concern about the pension contributions and stated that petitioner would propose replacing the pension plan with a profit-sharing plan and would discontinue the pension contributions upon expiration of the existing contract. Pet. App. A19-

A20; Tr. 209, 211-212. Souza replied that the Union did not have any proposals to make yet. In addition to his responsibility for the negotiations with petitioner, Souza was participating in negotiations with eight other employers and also was responsible for enforcing contracts with about 20 employers covering 1000 employees (Tr. 86, 138-139).

The parties began formal negotiations on May 1. At the beginning of the first session, in response to a question from Souza, company negotiator Robert Lee stated that petitioner was serious about discontinuing the pension contributions under the old contract. Souza submitted a list of proposals including increases in pension contributions, paid holidays and vacations, cost-of-living raises, and hourly wages. Pet. App. A20, A24-A25 & n.8; Tr. 251-252, 295, 299-300. Lee then stated that petitioner would propose a profit-sharing plan and that he would contact Souza when the proposal was ready (Pet. App. A20; Tr. 68, 145-146, 256, 302-304). Effective May 1, with no notice to the Union at that time or in subsequent negotiations, petitioner discontinued the pension contributions required by the expired contract (Pet. App. A20). The parties continued to negotiate in nine sessions from May to December. In nearly all the sessions the parties discussed the proposed replacement of the existing pension plan and submitted proposals and counterproposals involving either the proposed profit-sharing plan or the Union's desire to continue contributions at some level under the existing pension plan. Pet. App. A20, A22; Tr. 72, 119-121, 147-157, 274-275.[3]

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[3] Continued negotiations had not produced a new contract as of the Board's unfair labor practice proceedings in September 1981 (Tr. 73).

On a number of occasions from July to December, Northwest Administrators, the administrator of the pension fund, sent letters to petitioner and the Union stating that the fund had not received notice of renewal of the parties' contract and that the fund could not continue to accept contributions from petitioner unless it received a written contract signed by the parties (Pet. App. A20-A22, A27; RX 1-2, 4-6). On two occasions the Union responded that the parties were still negotiating (Pet. App. A22; Tr. 17-19, 80-81; RX 1). On September 23, petitioner sent a letter to the pension fund stating that it had not made contributions since May and that it did not intend to make contributions in the absence of a signed collective bargaining agreement. This was petitioner's first written notification to the fund that contributions under the contract had been discontinued. Petitioner did not send a copy of the letter to the Union. Pet. App. A20, A27. On November 21, Northwest Administrators notified both parties that it would not accept any contributions and would cancel the pension account unless it received a written contract within 30 days (Pet. App. A21-A22; RX 5-6).

On December 8, the Union sent a letter to petitioner stating that it had learned that pension contributions had not been made since expiration of the contract and demanding that petitioner "maintain all wages and conditions under the contract while negotiations continue" (Pet. App. A22; GCX 6). Late in December the Union received a delinquency report from the pension fund confirming that no contributions had been made from May through November. On December 29, the Union filed an unfair labor practice charge with the Board.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that pe-

titioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing, upon expiration of the existing collective bargaining agreement, the pension fund contributions required by the contract while negotiations for a new agreement were continuing. The Board rejected petitioner's contentions 1) that the Union waived its right to bargain about continuing the pension fund contributions during the 1977 negotiations and the 1980 preliminary negotiations; and 2) that because no written pension agreement or certification existed after expiration of the existing contract, petitioner was prohibited from continuing the established contributions by Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. 186 (Pet. App. A22-A26).[4] The Board ordered petitioner to make all pension fund contributions required under the expired agreement "which have not been paid, and which would have been [paid] absent [petitioner's] unlawful unilateral discontinuance[,]" and to continue the payments until the parties reached either a new agreement or impasse (Pet. App. A28).

3. The court of appeals enforced the Board's order. The court held that substantial evidence supported the Board's conclusion that the Union had not waived the right to bargain on pension contributions during either the 1977 negotiations or the 1980 negotiations (Pet. App. A5-A8, A13-A14).[5] In addition,

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[4] The Board also rejected petitioner's claim that the Union's unfair labor practice charge was untimely under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b) (Pet. App. A26-A27).

[5] Before the Board and the court of appeals, petitioner argued that three factors showed that in the 1977 agreement the Union had waived its right to bargain over contributions: 1)

the court found that the Board had properly rejected petitioner's claim based on Section 302 of the Labor Management Relations Act. The court stated (Pet. App. A8-A9):

> Under section 302 of the LMRA, an employer may make payments to a pension fund and the trust may accept them only if "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). * * *
>
> * * * * *
>
> Because a written agreement—the expired contract—specified the basis on which the Company

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the pension certification stated that it would expire when the collective bargaining agreement terminated; 2) petitioner successfully blocked a contractual provision that would have required pension trustee approval before stopping contributions; and 3) petitioner stated to the Union that it would make contributions only for the life of the 1977 agreement (Pet. App. A5-A6). The Board held, and the court agreed, that the language of the pension certification "does no more than ministerially attach to the enabling collective bargaining agreement" and did not abrogate the Union's statutory right to bargain over contributions; that rejection of the trustee approval clause did not affect petitioner's obligation to bargain with the Union; and that petitioner's statements in the 1977 negotiations were merely "loose verbalisms" in light of the parties' bargaining history (Pet. App. A5-A6, A25-A26).

In addition, petitioner argued that the Union's alleged failure to object to petitioner's statements of intent to discontinue contributions early in the 1980 negotiations constituted a waiver by inaction (Pet. App. A7). However, the Board found, and the court of appeals agreed, that these statements were insufficient to give clear notice to the Union and that the Union's failure to make an immediate objection was not a waiver in light of the parties' bargaining history (Pet. App. A7-A8, A13-A14, A25).

was legally obligated to make contributions, the literal language and underlying purpose of section 302 has been satisfied.[6]

## ARGUMENT

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," precludes an employer from unilaterally changing terms and conditions of employment that constitute mandatory subjects of bargaining. *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964). It is well-settled that the terms of a collective bargaining agreement define the status quo with respect to working conditions, and that an employer is required to maintain that status quo upon expiration of the agreement until the parties reach a

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[6] The court also held that the Board had properly rejected petitioner's claim that the Union's charge was untimely under Section 10(b), 29 U.S.C. 160(b) (Pet. App. A10-A11). In addition, the court rejected petitioner's contention that the Board's remedial order violated due process by requiring petitioner to continue making contributions in the face of the pension fund's November 21, 1980 notice that it would not accept further contributions after December 21, 1980 unless it received a written contract from the parties. The court held that the Board's remedial order required payment of only those contributions that would have been made absent the unlawful discontinuance, and that it was open to the company to show in a compliance proceeding following enforcement of the Board's order that it would not have been required to make payments that would not have been accepted by the trust fund (Pet. App. A11-A12).

Petitioner does not press either the Section 10(b) or due process claim before this Court.

new agreement or bargain to an impasse. *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB* v. *Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Petitioner nonetheless contends that it was privileged by Section 302 of the LMRA, 29 U.S.C. 186, unilaterally to cease its pension fund contributions upon expiration of the parties' collective agreement and that, in any event, the Union waived its right to bargain over contributions when the contract expired. These contentions were properly rejected by the Board and the court below and do not warrant review by this Court.

1. Section 302(c)(5)(B) of the LMRA, 29 U.S.C. 186(c)(5)(B), makes its unlawful for an employer to contribute money to an employee trust fund unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." Contrary to petitioner's contention (Pet. 6-14), however, where, as here, the basis for the contributions is adequately set forth in a collective agreement, Section 302(c) does not relieve an employer of its obligation to continue the payments merely because the agreement has expired. It is well settled that pension, health, and welfare plans provided for by contract constitute terms and conditions of employment that survive the expiration of the contract and cannot be altered without bargaining. *NLRB* v. *Cauthorne*, 691 F.2d at 1024-1025; *NLRB* v. *Carilli*, 648 F.2d at 1213-1214; *Harold W. Hinson d/b/a Henhouse Market No. 3*, 175 N.L.R.B. 596 (1969), enforced, 428 F.2d 133 (8th Cir. 1970). Accordingly, it is equally well settled that an expired contract that establishes the existing level of employee benefits satisfies the requirements of Section 302(c)(5)(B) of the LMRA that "payments are to be made as

specified in a written agreement." *Producers Dairy Delivery Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *NLRB* v. *Carilli*, 648 F.2d at 1213-1214; *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Denver Metropolitan Ass'n of Plumbing & Heating Contractors* v. *Journeyman Plumbers & Gas Fitters Local No. 3*, 586 F.2d 1367, 1373 (10th Cir. 1978); *Hinson* v. *NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). The congressional intent behind the requirement of a written agreement is "to allow each employee to know and to have a basis for enforcing his rights, and to eliminate discretion in union leaders to direct the funds." *Denver Metropolitan Ass'n*, 586 F.2d at 1372. Reliance on the terms of the prior contract effectuates these objectives.

Petitioner's reliance on *Moglia* v. *Geoghegan*, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969) (Pet. 10-11, 13-14) is misplaced. In *Moglia*, the parties had never executed an agreement of any kind governing pension contributions. Here, by contrast, the basis for petitioner's pension contributions was specified in a written agreement—the expired contract and attached pension certification. Pet. App. A9; see *Peerless Roofing*, 641 F.2d at 736 n.2.[7]

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[7] Contrary to petitioner's contention (Pet. 10-12), the fact that a separate trust agreement remained in effect after expiration of the collective bargaining contract in *Hinson*, 428 F.2d at 139, and *Peerless Roofing*, 641 F.2d at 736, does not render the reasoning of those cases inapplicable here. Rather, it is apparent from both the logic and language of those decisions that the employer's obligation under the Act to continue the contributions established in the expired collective agreement was a separate and sufficient ground for meeting the requirements of Section 302. *Hinson*, 428 F.2d at 139, and *Peerless Roofing*, 641 F.2d at 736; see also *NLRB* v.

2. Petitioner contends (Pet. 14-25) that the Union waived its right to bargain about continuing pension contributions in both the 1977 contract and the 1980 negotiations. The Board found that the evidence failed to establish a clear and unmistakable waiver under settled legal principles, and the court held that substantial evidence supported the Board's conclusion. Review by this Court of the Board's application of settled principles to particular facts is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[8]

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*Carilli*, 648 F.2d at 1213-1214; *Denver Metropolitan Ass'n*, 586 F.2d at 1373. Moreover, in *Producers Dairy Delivery Co.*, the court held that an employer's obligation to make contributions pursuant to an expired collective agreement satisfied the requirements of Section 302 where there was no separate trust agreement of any kind. 654 F.2d at 627.

In addition, as the court of appeals correctly concluded, there is no merit to petitioner's claim (Pet. 13) that the notices from the pension fund administrator relieved petitioner of its statutory obligation to maintain contributions negotiated by the Union. The Union, a wholly separate entity from the fund and its administrator, was not bound by the notices; moreover, the notices do not demonstrate that Section 302 required petitioner to discontinue the contributions. Rather, as the court of appeals found (page 8 note 6, *supra*), the notices are relevant only insofar as petitioner may be able to demonstrate in a compliance proceeding that certain specific contributions might not have been accepted by the fund. Pet. App. A9, A11-A12.

[8] In any event, there is ample support in the record for the Board's conclusion. With respect to the 1977 contract, the evidence shows no more than that the Union agreed that both the contract and the pension certification would expire on April 30, 1980, and that the parties would omit a clause requiring the fund trustees to approve any changes in the fund. These agreements did not abrogate petitioner's statutory obligation to maintain the status quo absent a bargaining impasse during the 1980 negotiations that followed the expira-

tion of the agreement. Indeed, even if the clause that the Union abandoned could be construed as an attempt to guarantee that petitioner would not discontinue contributions without the Union's approval, it is settled that the abandonment of an attempt to obtain a contractual guarantee of a statutory right does not waive that right. *NLRB* v. *Southern California Edison Co.*, 646 F.2d 1352, 1366 (9th Cir. 1981); *General Electric Co.* v. *NLRB*, 414 F.2d 918, 924 (4th Cir. 1969), cert. denied, 396 U.S. 1005 (1970); *Timken Roller Bearing Co.* v. *NLRB*, 325 F.2d 746, 750-751 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964).

Petitioner's reliance on *Cauthorne Trucking*, 256 N.L.R.B. 721, 722 (1981), remanded on other grounds, 691 F.2d 1023 (D.C. Cir. 1982) (Pet. 17) is misplaced. In *Cauthorne*, the pension agreement expressly stated that "at the expiration of any * * * collective bargaining agreement * * * the * * * Company's obligation under [the] Pension Trust Agreement shall terminate unless, in a new * * * agreement, such obligation shall be continued." Such language constitutes more convincing evidence of an intent to waive the right to bargain than does the language here, which stated no more than that the contract and the pension certification were to expire on the same day (Pet. Supp. App. A46).

With respect to the 1980 negotiations, petitioner contends that it gave the Union notice of its intent to discontinue contributions and that the Union failed to object or attempt to bargain, thereby waiving its right under the Act. Contrary to petitioner's claim, the Board reasonably concluded that petitioner's statements about discontinuing the contributions did not constitute a clear notice of intent to depart from past practice in light of its prior protests and its willingness to continue contributions during previous negotiations. Moreover, the statements were made at informal sessions before formal negotiations began and at a time when the Union was still formulating its own proposals and the Union's chief negotiator was involved in negotiations with a number of other employers (page 4, *supra*). In addition, the Union and petitioner continued to bargain over pensions, offering proposals and counterproposals throughout the negotiations. Pet. App. A7-A8, A13-A14, A20, A22, A24-A25; Tr. 72, 119-121, 147-151, 274-275. Thus, the cases cited by petitioner at Pet. 22-24 & n. 14 are simply inapposite because, unlike the present

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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case, they involved inaction by a union in the face of clear notice from an employer.

Finally, contrary to petitioner's claim (Pet. 22), the Board has not announced a "new rule" requiring only formal written notice that satisfies the union's subjective judgment before it will find a waiver by inaction; rather, the Board held merely that, in light of all the objective circumstances, including the parties' bargaining history, petitioner's statements amounted only to "opposition rhetoric on [a] long-festering topic" and not to clear an unequivocal notice of an intent to discontinue contributions to the fund (Pet. App. A25 n. 8).

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